Vietnam and the Law

The Theory & Practice of Civil Challenge

Beverly Woodward

On July 10 of this year four men were sentenced in Boston to two years in prison for conspiring to counsel young men to violate the nation's draft laws. They were the renowned pediatrician Dr. Benjamin Spock, Yale University Chaplain William Sloane Coffin, Jr., writer and college teacher Mitchell Goodman, and Michael Ferber, a Harvard graduate student. (A fifth defendant, Marcus Raskin, had previously been acquitted.) This marked the end of the first chapter in a case which has already stirred considerable controversy and which may prove to be of landmark importance, should the Supreme Court eventually agree to hear it on appeal. But the case has aroused something more than controversy. Even more significantly, I think, it has been a source of considerable confusion. Those who followed the case knew that the defendants had quite openly declared their opposition to the war in Vietnam on both moral and legal grounds and that they had offered moral and financial support to those young men who refused to participate in the war. Moreover, they knew that some of the defenddants had practically asked to be arrested on certain occasions, stating that their actions (such as helping with the turning in of draft cards) obviously violated the law. To most observers, therefore, this looked like a clear-cut case of civil disobedience, that is, a case where men had publicly disobeyed the law for the sake of conscience. Presumably these men were ready to accept the consequences of their actions. Why, then, did they not act like civil disobedients after they were indicted and their case went to trial? Why did they contest the charges brought against them? Why did they plead "not guilty" rather than acquiesce to whatever penalty might be meted out by the court?

The obvious answer and the conclusion reached by many was that the defendants had weakened when actually confronted with a prison sentence. Rather than face the consequences of their actions, they had tried to find a way out. In this article I shall try to show that this was not the case and that the seeming inconsistency of their actions arose more from a lack of clarity on their part concerning what they were doing than from any moral wavering or weakness. In other words, the defendants' confusion led to the public's confusion. But this confusion was understandable, for it stemmed from a major lacuna in our political vocabulary.

I

Civil disobedience is by now a familiar form of lawbreaking. What is familiar, however, is not always well understood. One sign that civil disobedience is not too well understood is that it is often lumped together with or confused with actions that are actually quite different from it. It may in fact be taken to be almost any kind of lawbreaking engaged in on moral grounds or for the sake of some sort of political goal. Consequently, it may be thought to include essentially uncivil dissent or rebellion on the one hand, and challenges to the constitutionality or validity of statutes, commands, or governmental actions on the other.

It is this second kind of action that I wish to discuss here. Though it has often been lumped together with civil disobedience, I believe that it differs from civil disobedience in significant ways and that it merits a label of its own. I therefore have coined the phrase "civil challenge," which I define as: the deliberate, public nonviolent infringement (or what is likely to be deemed an infringement) of a law or command on the grounds that the law or command is without legal validity, particularly where the primary aim of such action is to bring about a change in governmental policy.*

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* Just as there exist cases of violent *disobedience* to law, which nevertheless may purport to be morally grounded, so there can exist cases of violent *challenge* to the validity of a law or command. That is, civil disobedience and civil challenge have as their counterparts uncivil disobedience and uncivil challenge. But I am devoting my attention here to civil (or *nonviolent*) challenge as a contribution to the ongoing discussion concerning the forms of nonviolent action available to those who seek to bring about political change. And I suggest later that this kind of action could be replaced by an even more effective and "rational" form of action if certain changes were instituted in our judicial system. The premise underlying the whole discussion is that the primary responsibility of those who are distressed by violent disruption is to point out and to help create alternative forms of action.

The inclusion of the phrase, "particularly where the primary aim of such action is to bring about a change in governmental policy," may seem to make my definition unnecessarily restrictive. There are challenges to the law undertaken primarily for the sake of obtaining a private advantage. A man may break a law or regulation and then test its meaning and legality in the courts principally for the sake of advancing a personal interest. But I am concerned mainly with the appeal to the judiciary as a form of *political* action and I therefore have framed my definition to focus especially on such cases.

I recognize, however, that the focus is not perfect and that the definition leaves considerable room for borderline cases. For example, when a religious sect attempts to secure freedom from governmental harassment, is it pursuing a private interest or is it pursuing a political goal? It seems to me that one cannot give an abstract answer. It depends on the circumstances of the particular case. Sometimes private interest and the common good may be inextricably intertwined. What is crucial in such cases is the way in which the action is conducted. Is the emphasis on private injury or is the emphasis on the constitutional issues and the public wrong involved?* A true civil challenger does not want to win for the "wrong" reasons or in the "wrong" way. He does not want to win, for example, because the authorities decide on merely prudential grounds to leave him alone; and if he goes into the courts, he does not want to win his case on a technicality. In fact he will do all that he can to structure his argument so that this will not happen.

TAKING MY definition as it is, then, what distinguishes civil challenge from civil disobedience? Although the lines are not always hard and clear, for the sake of creating "ideal types" let me make the following distinctions:

(1) Acts of civil disobedience and acts of civil challenge sometimes differ in the kind of objectives they pursue and they always differ in the remedies they seek. Some acts of civil disobedience may be quite apolitical and may be undertaken only to maintain the "purity" and integrity of the individual (or group). In those cases where civil disobedience does have political objectives, it attempts to achieve them through an appeal to the conscience of the entire body politic or some segment of it—or sometimes through the pressures created by disruptive action—and it aims at obtaining political change through *legislative* or *executive* action. By contrast civil challenge is by definition *always* politically motivated and is primarily an attempt to appeal to and put pressure on the courts. It is only secondarily an appeal to other parts of the body politic. Civil challenge seeks to obtain change through *judicial* action.

(2) Civil disobedience is, as just stated, primarily an appeal to conscience, whereas civil challenge is primarily an appeal to already existing "fundamental law."

(3) The apolitical or anarchistically inclined civil disobedient may be satisfied with a remedy which affects only himself. (Thoreau probably would have been satisfied if the tax collector had just stopped visiting *him*.) The civil challenger always seeks a more general and a more enduring remedy. He believes that judicial action, and in this country action by the Supreme Court in particular, fulfills these objectives better than legislative or executive action.

(4) Civil disobedience may, for the sake of creating disruption, involve breaking laws which the protester is not trying to have changed, while civil challenge only involves transgressing laws or not heeding commands whose validity is challenged. In the case of civil disobedience, disruption is often believed to be necessary to attract the attention of those segments of the public which are indifferent to the wrong being protested. In the case of civil challenge, however, the aim is to get the courts to recognize the *legal* wrong which exists. Therefore, the effort of the civil challenger must be to present the most clear-cut case possible, not necessarily the most stirring or "jolting" case possible. It should be mentioned, though, that just as the civil disobedient sometimes breaks laws which are only indirectly related to the wrong which is being protested, so the civil challenger may challenge the validity of a statute or command as an indirect means of challenging some even greater legal wrong (as at present when a man who could get a draft deferment or exemption nevertheless chooses to break some Selective Service regulation thereby making it likely that he will eventually be ordered to report for induction; this gives him the chance to refuse to serve and thus the opportunity to raise in the courts the question of the legality of American action in Vietnam).

(5) Both civil disobedience and civil challenge involve an element of obedience. The civil disobedient, however, invokes higher moral laws, while the civil challenger invokes the highest laws of the polity. The civil challenger may in fact see his action as not being disobedient at all, since he does not concede the validity of the law or command not followed; but the very term "civil disobedience" implies that disobedience is involved and the admission that a law has been broken.†

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* This is a particularly difficult example because it is not clear when and to what extent a public wrong is involved when injury to conscience takes place. By public wrong I mean here a wrong that injures the body politic as a whole. The difficulty arises because it is very hard to find objective criteria which identify a public wrong.

† See Richard Wasserstrom's comments on this point in "Civil Disobedience," a booklet published by the Center for the Study of Democratic Institutions, 1966, p. 18.

So much for some of the theoretical distinctions. What should be clear is that the civil challenger will adopt a much more aggressive stance in court than the civil disobedient, that he will always plead not guilty (since he is contesting the law or some application of it), and that he will view his trial not just as a trial of *his* actions, but as a trial of what purports to be law and as a trial of those responsible for making and enforcing the law. Finally, unlike the civil disobedient, who will use his trial primarily to awaken the conscience of the general public, the civil challenger will use his trial primarily to attempt to bring the courts to play a more active role in the political process.

Having made the distinction between civil disobedience and civil challenge, I do not want it thought that I am saying that the second form of action is superior to the first. If the individual is concerned with being as effective as possible, it might be argued that he should choose civil challenge whenever the circumstances permit. There may be cases, however, when it will seem more effective to appeal to the general public, even though a legal appeal is technically possible.

II

THE UNITED STATES has, as we know, a unique Constitution and an even more unique constitutional history. It is this history which makes it possible to speak not only of a theory of civil challenge, but also of its practice. For even if not baptized as "civil challenge," this kind of action has often been undertaken, perhaps most notably in the campaign for civil rights. Certainly a great deal of what was called civil disobedience in connection with that campaign properly belongs in the category of civil challenge. The fact that in most cases the rights sought were asserted to be rights already guaranteed by the polity should make that clear.

Other well-known cases of civil challenge have involved publicly transgressing statutes or executive orders concerning: the relocation of Japanese-Americans in World War II, the right to strike, the use of the streets for large demonstrations, the investigative powers of the House Un-American Activities Committee, the government's taxing powers, and the dispensing of birth-control information.

The last example provides a particularly clear-cut instance of civil challenge. In Connecticut, the Planned Parenthood League opened a center in New Haven in 1961 which not only disseminated information concerning birth control, but also provided birth control devices for a small fee (or in some cases for no fee). The express purpose of opening the center was to test the constitutionality of certain Connecticut statutes, enacted in the 19th century, which made it illegal both to use contraceptive devices and to provide such devices to others for their use. When the case reached the Supreme Court in 1965, the Court ruled that the statutes were in fact unconstitutional because they interfered in an unjustifiable way with freedom of association and because they involved an invasion of a zone of privacy that is protected (albeit indirectly) by the Bill of Rights.

Not all the challenges I have mentioned were as successful as this one, but all of them were made possible by the language of the Constitution and, more importantly, by the power of the Supreme Court to interpret that document. The language of the Constitution is important because it embodies explicitly many widely acclaimed political rights and implicitly some of the fundamental moral values of Western society. The power of the Supreme Court is even more important because it has enabled the Court to become involved in "a kind of continuous constitution-making"* whereby these rights and values have been expanded and secured. It is this combination of circumstances which makes it possible to view the Supreme Court as having a potentially revolutionary function, since it may bring about a radically new understanding of the fundamental law to which all other law and all governmental action must conform, and yet as being an essentially conservative institution, since it is charged with preserving the ideas and ideals of the Founding Fathers. Of course, these two attributes of the Court are not always in harmony, yet sometimes it is only by taking what looks like a radical step that the Court is able to uphold the most long established values of the American republic.

If, as Barbara Deming has said, "The most effective action *both* resorts to power *and* engages conscience,"† then the American constitutional system provides channels for a type of action which, potentially at least, can be very effective. I have said that civil challenge is not primarily an appeal to conscience. That is true in one sense. Yet in another sense civil challenge can be seen as an appeal to a certain form of conscience, namely to that amount of conscience which is already embodied in the law. Although there are some flaws in the way in which civil challenge must function under the American system (which I shall discuss later), it is obvious, I think, that committed civil challengers in this country have achieved notable gains for the polity. To be sure, some sorts of demands have been more easily accommodated than others. Demands for economic justice, for example, have often fared less well

* The phrase comes from Hannah Arendt's *On Revolution*, a book to which my thought is very much indebted.

† See her thoughtful article, "On Revolution and Equilibrium," in *Liberation*, February 1968, p. 14.

than more strictly political demands.* It remains to be seen to what degree this situation is remediable without major constitutional amendments.

I do not wish to seem overly sanguine about the possibilities of the kind of action I am describing. Fundamental legal growth which brings with it a change in the political order cannot occur solely through the actions of the courts. Here Judith Shklar and other critics of "legalism" are quite right. Some readiness for the actions of the judiciary must already exist in the body politic. But it is important to note that civil challenge conscientiously ~~re~~scientiously carried out and conscientiously ~~re~~repeated, may have an educative effect on the body politic and may help to create this readiness. It may, in effect, help to create the conditions for its own eventual success. Furthermore, the civil challenger can supplement his challenge with other forms of action aimed more directly at the general public. But he cannot, without contradicting his goals, substitute any other form of action for the challenge itself. For what he seeks is neither something so mild as a new law nor so drastic as an overthrow of the existing order, but instead a reinterpretation of the framework within which the body politic is to move. Of course, a ruling of the judiciary may be defied. But that in no way negates the fact that the rulings of the Court, when favorable and when complied with, accomplish just what the civil challenger seeks and that nothing else, except possibly a constitutional amendment, could do the same thing.

III

THESE CONSIDERATIONS are particularly well illustrated by the actions of many presently active draft resisters.† Though some of them wish only to assert their autonomy from the government, and their utter unwillingness to take part in its foreign adventures, others wish to help create precedents which will effectively limit the government's war-making powers now and in the future. A noteworthy instance is the case of David Mitchell, who has been called "America's foremost draft challenger." He has not used his "disobedience," namely his refusal to report for induction, merely for the sake of gaining exemption for himself from taking part in the government's activities in Vietnam. Rather, he has sought to have those very activities declared in violation of the Constitution and of international law. His aim has been to inhibit the government's capacity to continue the present war and at the same time to reestablish as a fundamental tenet now and for the future that "the war power of the United States, like its other powers, . . . is subject to applicable constitutional limitations."** When Mitchell's case reached the Supreme Court, the Court declined to review it; however, Mr. Justice Douglas dissented, indicating that while the case involved "extremely sensitive and delicate questions," they were questions which in his judgment should be answered.†† In a subsequent case involving three Army privates who sought to prevent the government from shipping them to Vietnam (popularly known as the case of the Fort Hood Three), similiar issues of constitutional and international law were raised, and in this case both Mr. Justice Douglas and Mr. Justice Stewart dissented from the Court's denial of *certiorari*.***

Some who are opposed to the war in Vietnam and sympathetic to the draft resisters have nevertheless voiced reservations about draft resistance. They believe that such activity may be politically ineffective or "counter-productive" due to the hostility it will arouse in the general public.††† Such considerations merit attention. But in asking questions about effectiveness it is also important to ask whether the action under consideration makes it quite clear just what it is that is desired and what it is that is rejected. The current civil challenger who challenges the draft believes that it is important to bring about a reformed legal order rather than simply to obtain new leaders or a change in our foreign policy. Leaders come and go, and policies may shift under the exigencies of the moment (such as the need to please the electorate), but fundamental reinterpretations of the legal order have the capacity to alter enduringly the shape of the future by altering the framework within which all other change will occur. Even

* I am thinking of cases such as the child-labor case of 1921 which overturned a federal law making the interstate shipment of child-made goods illegal on the ground that the law was not truly a regulation of commerce among the states, or the Debs decision in which it was held that the federal courts could (without benefit of an act of Congress) issue injunctions against strikes that threatened to impair interstate commerce.

† At this point I should probably explain how I define several key terms. By "draft refuser" I mean one who refuses induction, whether solely on grounds of conscience or whether for the sake of political aims or for the sake of having his classification reviewed in the courts. By "draft challenger" I mean one who refuses induction and who uses his refusal to create a challenge to the constitutionality of the Selective Service Act and/or to the legality of the war. By "draft evader" I mean one who avoids military service by subterfuge or by leaving the country. By "draft resister" I mean a draft refuser or a draft challenger or someone who supports draft refusal and/or draft challenge. I do not include draft evasion in this last category.

** Mr. Justice Brandeis speaking for the Court in *Hamilton v. Kentucky Distilleries and Warehouse Company*, 251 U.S. 146, 156. The quotation occurs in a brief written by Mitchell.

†† *Mitchell v. United States*, 386 U.S. 972, 87 *Supreme Court Reporter*, 1162, 1163.

*** At least four justices must be in favor of review for *certiorari* to be granted.

††† See the statement "Students & the Draft," in *Dissent*, May-June 1968, p. 193.

when it is apparent that this kind of alteration cannot be brought about immediately or in the near future, it may be essential to focus on the fact that this is what is sought.

What the draft challengers stress is that our system of checks and balances is threateningly out of kilter and that the primary problem is not *who* is to be President, but *how the President may use his office*. The question is whether the American system of checks and balances can be made to work once again in view of the vast amount of military power at the disposal of the Executive. Furthermore, they insist that the Supreme Court must begin to play a more active role in the interpretation and enforcement of international law and that it will not do so except under the impact of challenges such as theirs.

It is unfortunate, of course, that in the popular mind draft evasion and draft refusal (whether based solely on grounds of conscience or whether undertaken with political aims in view) are often regarded as the same thing. The solution, however, is not, it seems to me, to discourage conscientious draft refusal or draft challenge or the draft resistance movement in general, but rather to try to expand the awareness of the general public and to point out what should be obvious: that the draft refuser is led to refuse precisely because he is unwilling to evade. Furthermore, as is usually admitted even by the supporters of the war, the individual who strongly believes the war to be immoral or illegal or both has little choice except refusal if he is asked to serve in it. The only question is whether he is going to accept the role of a martyr or whether he is going to challenge the government's right to make him a martyr. In either case there may be some who will label his refusal to serve "radical resistance," implying that the action is an extreme one, but it may not seem that way to the resister. In his eyes it may be simply the only appropriate action he can take given his perception of the existing moral and political reality.

The draft *challenger* would be especially adamant on this last point. If one is confronted with a crime, he might argue, and asked to take part in it, one can say "yes" or one can say "no" or one can try to ignore the invitation and walk away. But crime is not suppressed either by saying "yes" or by walking away, but only by saying "no" (up till this point he and the civil disobedient draft refuser would be in agreement) *and* by calling in the proper authorities. If the proper authorities do not exist, then one tries to help create them.

THERE IS, nevertheless, a sticky point for the individual who is convinced of the illegality and the immorality of the war. This concerns the question of the proper point of refusal. At what point should he make it clear that he will not contribute to the war effort? Some take the position that the most appropriate moment is when an order to report for induction has been received, while others argue that resistance at that point may be "premature" since the individual cannot be sure that he will be sent to Vietnam. Individuals who have decided to refuse at the point of induction counter this reservation by arguing that since the draft is currently an instrument used to further an illegitimate enterprise, they are obliged not to allow themselves even to be inducted lest they appear to be conspirators or accomplices in that enterprise. (They also argue that they would be supporting the Vietnam adventure indirectly merely by being in the service, no matter where they were sent.)

Somewhat ironically, the government's charge of conspiracy in the case of the Boston Five (Spock, Goodman, Coffin, Raskin, and Ferber) lends weight to this argument. Conspiracy is a charge that may be used either against those who support and promote a war or against its opponents, depending on whether the war is believed to be illegal or not. Conspiracy was as a matter of fact a major element in the charges at Nuremberg. Now if one contends, as did the government —and indeed the judge—in the trial of the Boston Five, that an individual can be held guilty of conspiracy by virtue of agreeing to commit *one* act which furthers an illegal enterprise, even though the illegality of that enterprise is not manifest and in fact is a subject of dispute, and even though the individual has not taken part in planning that enterprise, then the circumspection of those who refuse induction hardly appears excessive.* This conclusion seems all the more evident when one considers that a conspirator may be held accountable for *every* act committed by anyone in the course of the "conspiracy" (at least if those acts could reasonably have been anticipated).

A conclusion one might draw from these remarks is that conspiracy charges are quite unsuitable where alleged political crimes are concerned, a conclusion in which I am inclined to concur. A further conclusion might be that even if conspiracy were eliminated as a possible political crime (or extraordinarily tightened up in its definition), it should be legally possible to dissociate oneself from governmental actions of contested legality without incurring criminal sanctions in the process. In other words, even if an individual cannot argue that he may be liable to punishment at

* The conspiracy charge was actually applied in a much more restricted way at Nuremberg, but the Nuremberg Charter and the subsequent formulation of the "Nuremberg Principles" by the International Law Commission of the United Nations are phrased in such a way as to permit a considerably looser application by some future international court or victor's tribunal. The point is not that it is *likely* that some future tribunal will convict and punish a man who merely accepted induction into the armed forces of a country engaged in an illegal war. The point is that theoretically it could do so, given the current state of international law.

some future date because he took part in a governmental enterprise which he believed to be illegal at the time and which was later held to be illegal, still he should be able to dissociate himself from governmental enterprises whose legality is doubtful without having to go to jail or pay some other penalty as a result. The criterion for penalty-free dissociation should not be that association might render a man liable to prosecution in the future, but only that no one can rightfully be compelled to contribute to an illegal undertaking.* In order to apply this criterion in favor of a petitioner, the Court would have to rule either that the contested activity was in fact illegal, or alternatively that the petitioner had reasonable grounds for believing that the activity *might* be illegal as long as its legal status had not been established by the proper authorities. Conceivably the second possibility might be utilized with regard to the war in Vietnam, and the Court could hold that the war's legality or illegality under international law ought to be established by some higher authority. It might indicate what that authority would be; for example, the United Nations or the International Court of Justice or some presently nonexistent international tribunal.†

Even those who believe that America's activities in Vietnam have been and continue to be an illegal exercise of power under international law—or to put it less antiseptically, even those who believe the United States to be guilty of war crimes and of conducting a war of aggression—may be perplexed as to whether it would be more desirable for the Supreme Court to rule directly on the war's legality under international law or more desirable for it to indicate that the decision properly belongs to some higher authority. In one sense there is no higher authority; in another sense there must be one (read "come to be one") if certain sorts of problems are to be resolved satisfactorily over the long run. Even though technically the Court has the authority to rule on the war's status under international law, it might be preferable that it not do so, *if* it could use its abstention to aid in the development of badly needed international legal institutions. What I am saying is that the Court should take the course which is most likely to increase the effectiveness of international law and that at this point I am uncertain what that course is.

YET EVEN though one can argue that it would be more appropriate for an international body to rule on the questions of international law that are raised in the cases presented by the draft challengers, those questions involving the powers of the office of President seem to be directly within the province of the Court. It is true that the Court has often avoided such questions by an appeal to the political question doctrine. This doctrine, insofar as one can sum it up, states that certain questions should be resolved by what are called the "political" branches of the government, namely the executive and legislative branches, and that such questions are, for various reasons, not suitable for judicial determination. (The doctrine, as can be seen, is related to the doctrine of the separation of powers.) In the past, many questions related to the conduct of foreign affairs have been held to belong in this category. But this would be an odd doctrine to invoke when one of the major questions at issue is precisely whether one of the political branches has been infringing on the prerogatives of the other political branch. That would seem to be just the kind of question which neither of these branches could settle.

Evidence of this is provided by the continuing debate between the Senate Foreign Relations Committee and the executive branch. Parts of this debate are referred to in Mr. Justice Douglas's dissent to the denial of *certiorari* in the case of the Fort Hood Three where he points out Mr. Katzenbach's and Senator Fulbright's rather different views of the role Congress was intended to play in the initiation and conduct of war. It seems clear that as long as the Executive and Congress disagree about their respective roles under the Constitution, they can only resolve the difficulty by means of a power struggle. Yet a question of constitutional interpretation cannot really be "settled" in this way. Therefore, for the Court to say in this instance that the doctrine of the separation of powers prevents it from ruling on a constitutional question involving the separation of powers would be to go around in circles. It would be like saying: the Constitution does not permit us to do what it has empowered us to do.**

If the Court agrees to review a case which raises the question of the constitutionality of the actions of the Executive, it will be faced with a rather

* A difficulty which judges and legal theorists will have to deal with is how to define what constitutes a "contribution" to such an undertaking.

† Professor Vern Countryman of Harvard Law School tells me that it is highly unlikely that the Supreme Court would state that the authority to decide such issues properly belongs in some presently nonexistent tribunal. However, the kinds of cases I am discussing are unprecedented in so many ways that I do not wish to preclude the possibility of an unprecendented type of action by the Court.

** The political question doctrine has always contained this potentiality for incoherence. This stems in part from the different and sometimes clashing aspects of the doctrine of the separation of powers, which was meant not only to keep the different departments from interfering with each other, but also to make it possible for them to act as checks on each other. It is important to note in the cases presented by the draft challengers, however, that the Court is not being asked to tell the Executive what *to do* in matters of foreign policy, but is being asked to lay down limits which will indicate to the Executive what he *cannot* do in the conduct of foreign policy.

thorny problem which probably should be mentioned here. The problem stems from the constitutional provision which empowers Congress to declare war. As pointed out in the *Prize Cases* (1862), a formal declaration of war brings in its train a variety of legal consequences. The Executive has argued that in fighting limited conflicts it is often desirable not to invoke these consequences, and has used this argument as an excuse for not obtaining a declaration of war in the case of Vietnam. Yet even though it may not seem desirable to declare war every time the country is involved in a military conflict (from the pacifist point of view it is never desirable that the country declare war, but I am arguing here from a more "realistic" standpoint), it would seem desirable and in conformity with the intentions of the framers of the Constitution that Congress should play a major role in deciding what our military involvements are to be. Jefferson, for example, said: "We have already given in example one effectual check to the Dog of war *by transferring the power of letting him loose* from the Executive to the Legislative body, from those who are to spend to those who are to pay."* Surely that remark does not describe the present situation where Congress finds itself ratifying one *fait accompli* after another and often doing so on the basis of erroneous and biased information.

In a recently-filed taxpayers suit challenging the constitutionality of the war, Lawrence Velvel, a professor at the University of Kansas Law School, suggests a way out of this dilemma.† He contends that Congress can declare either a general or a limited war and maintains that a carefully specified limited declaration of war can be used to avoid invoking consequences that are not desired in a particular situation. He supports his argument with quotations from John Marshall and other early justices of the Supreme Court. Furthermore, he argues (in a very forcefully written brief) against the notion that declarations of war have somehow in recent years become outmoded. He states that such declarations were not "all the vogue when the Constitution was written, but the framers nevertheless wisely chose to hem in executive power by allocating to Congress the power to declare war." In sum, Velvel contends, and I think he is correct, that if Congress was given the power to declare war in order to prevent the Executive from using its own initiative to lead the nation into important military conflict, then there must be some functional flexibility in this power. The power cannot be held to be so inflexible as to make it impossible for Congress to act even in a conflict which, like the one in Vietnam, involves over 500,000 American soldiers.

It is to be hoped that serious attention will be given to these arguments. If it were granted that Congress has considerable flexibility in the kind of war it can declare, then the Executive could no longer excuse its failure to obtain a declaration of war by saying that such a declaration would mislead other nations as to the limited nature of United States objectives in a particular conflict. The "formalistic" reasons given for not allowing Congress to play the role assigned to it under the Constitution would lose their plausibility.

IV

BUT EVEN THOUGH it is possible to devise solutions to the theoretical problems the Court will face if it decides to consider the question of the legality of the war, many believe that the real problems are practical ones and that the corresponding reasons in favor of judicial abstention are also of a practical nature. Two sorts of practical considerations are usually mentioned. It is said that the Court's opinion, if adverse to the Executive, will not be heeded and that the Court will suffer a loss of prestige and authority; and it is said that it is necessary for the nation to present a united front in its dealings with other nations and that the judiciary should not do anything that would contribute to an appearance of disunity.

These considerations are important ones certainly, but perhaps less compelling than in the past. With regard to the Vietnam war it is a little late to speak of unity. The existing disunity of the country is already manifest to everyone, both at home and abroad. Indeed it may be that unity in wartime is a thing of the past, at least in this country. Interventions of the Vietnam type will no doubt continue to provoke great internal discord and a war involving nuclear weapons may not leave much time for thinking or for rallying round the national standard. In more general terms one can say that the justification of war in any form has become problematic to many and that an increasingly well-informed and skeptical youth is likely to continue to question our official foreign policy, whatever it may be. They can be expected to insist that unity is not a virtue if it is unity in folly or unity in crime.

The second objection to judicial intervention is a more weighty one. The Court will admittedly be taking a risk if it delivers an opinion in an area where it has previously remained silent. That risk, though, must be weighed against the long-term and not so long-term risks of relatively unrestrained action by the Executive. Anyway, an illegal war is a very complicated form of illegality.

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* Quoted by Mr. Justice Douglas in his dissent to the denial of *certiorari* in the case of the Fort Hood Three (*Mora v. McNamara*, 88 *Supreme Court Reporter*, 282, 284). Emphasis added.

† *Velvel v. Johnson, Rusk & Clifford*, Civil Action No. T-4417, filed in the United States District Court for the District of Kansas. Most of the brief he has written will appear in a forthcoming article in the *Kansas Law Review*.

The Court would probably have to frame its judgment in such a way as to recognize that this complex illegal situation cannot be brought to an immediate end, however desirable that might be. As in the case of segregation, the Court might ask only that certain fairly feasible steps be taken in the immediate future. Such a ruling would be less likely to be flaunted than one of a more sweeping nature.

In addition, the climate for judicial intervention may improve as the flaws in the electoral process become more manifest to the general electorate. Even now there are a significant number of people who are looking for a way to inject more reason, judgment, and restraint into the conduct of foreign policy. The course of events may make it increasingly apparent to them that judicial institutions have an important role to play in this respect. To a growing number of people, thoughtful judicial action may come to seem more and more desirable.

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IF CIVIL CHALLENGE is a respected part of the American legal tradition and a necessary part of the process of expanding and reinterpreting our fundamental law, then it would appear to be out of harmony with our constitutional system to prohibit its advocacy. Yet that in effect is what the current Selective Service Act does. This statute makes it a crime to counsel, aid, or abet any selective service registrant to refuse service and at the same time apparently makes it impossible for a registrant to test the constitutionality of certain portions of the statute, or of the statute as a whole when applied in certain ways, without first refusing induction. Thus, under the terms of the statute, anyone who counsels or aids a draftee to make a test case by refusing induction might himself be held guilty of a crime.*

It is because of the particularly dubious status of this section of the Selective Service Act that Spock, Coffin, Raskin, Goodman, and Ferber were quite right to follow their second thoughts and resist the charges brought against them. Some of the five may have at first envisaged their actions as civil disobedience, but they soon realized the necessity of contesting and challenging the charges with which they were faced. The situation was complicated by the fact that what they were charged with was not "counseling, aiding, and abetting," but "*conspiring* to counsel, aid, and abet." This necessitated a twofold response: they argued that first of all they did not in fact conspire and secondly that even if there had been an agreement (agreement being the central element in a conspiracy) to "counsel, aid, and abet," such an agreement would not be an agreement to do what is unlawful because the prohibition against counseling, aiding, and abetting is an unconstitutional one. They argued that it is unconstitutional not only on the grounds that I have mentioned, namely that it can be applied in such a way as to prohibit advocating or supporting "test cases," but also on the grounds that it inhibits or forbids kinds of speech which are protected by the First Amendment and which are necessary for the health of an open and democratic society.

It is unfortunate that the defendants were not more clear from the beginning about the nature of their action. Of course, they could not be expected to have anticipated a conspiracy charge, a charge which they had to resist because they believed it was both factually incorrect and the kind of weapon which could be used as a powerful deterrent to political opposition of all sorts in this country. But they could and did (except for Raskin) anticipate that they might well be indicted for "counseling, aiding, and abetting" and it would have avoided considerable confusion in the mind of a large part of the public if they had realized and stressed from the beginning the necessity of challenging the constitutionality of *that particular section of the Selective Service Act*. As it was, there were many who reproached them for not following in "the great tradition" of civil disobedience or for not being true to their cause.

The problem was, though, that they had more than one cause, partly because there were five of them and partly because of the complexities of the situation which they were protesting. Some of them probably thought of their protest as primarily a moral protest at first. Others had focused more on the legal aspects of their actions, but had a diversity of questions they wished to present in the courts. Theirs was a case of the indirect kind of civil challenge which I mentioned earlier. That is, by infringing the law they wished to challenge not just the law itself, but much more importantly the even greater illegalities being perpetrated by the government. Principally they wished to challenge the legality of the war and the legality of the draft when used as an instrument to prosecute the war. Quite rightly, they wanted to obtain rulings that would not only acquit them, but would also help to bring an end to the war and an end to the use of the draft for carrying on the war. For this reason they did not at first emphasize the "free speech" aspects of their case. But faced with the trial court's refusal to consider the central issues and faced with what Reverend Coffin termed the "demeaning" situation of being charged with the wrong offense, they were compelled to shift the focus of their attention.

* It is also possible for a draftee who wishes to test the constitutionality of the Selective Service Act to wait after he has been sworn into military service and then file a habeas corpus action to get out. But this is not a satisfactory procedure for most draft resisters, since if they lose, they will be caught within the military system.

In sum, the diversity in the behavior of the defendants and the multiplicity of the defenses they have raised may be confusing, but under the circumstances it was probably unavoidable. Things would be a great deal simpler if it were possible to challenge the government more directly for its illegal, or seemingly illegal, actions. Why should a citizen have to break a law that is only related in a tangential way to the governmental wrong which he wishes to bring to the attention of the courts? Why should a citizen have to break a law at all in order to get the courts to rule on whether the government has broken the law? I shall return to these questions at the end of this article. But the questions are meant to indicate that the Boston Five were faced with a situation that was complex and that some of the complexities stemmed from irrationalities in our system of judicial review. Furthermore, it must be added that the defendants were in the position of undertaking a type of challenge for which there were few precedents. Therefore they had to take all the risks that are involved in learning by doing.

It may be worthwhile to return to one part of the preceding argument. I can imagine someone wondering whether there ought not to be some sort of limits to the right to advocate lawbreaking, even where the lawbreaking advocated is to be open and used as a means of testing a law's meaning or constitutionality. Is it so clear that it is always unconstitutional to prohibit the advocacy of what I call civil challenge? In one sense the answer is that it is not clear at all, since what is constitutional can be said to be what the Court declares to be constitutional, and the Court's position on this matter is not fully apparent. In *Keegan v. United States,** the Court stated: "One with innocent motives who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counseling, stealthily and by guile to evade its command."

The stickler in that pronouncement revolves around the interpretation of the phrase "innocent motives." What motives are innocent? Are political motives innocent? Are some political motives innocent and others not? Which ones? How will the Court decide? Does the Court really want to discourage political challenges? Will that be to the benefit of our political processes?

IF THE CASES of Spock, Coffin, Goodman, and Ferber reach the Supreme Court and are reviewed there, it is possible the Court will feel compelled to come to grips with some of these questions. The problems here are complex because the central question involved is not just "When can the state permit the advocacy of unlawful activity?" but "When can the state permit the advocacy of activity of *contested* legality?" Surely the state does not want to be in the position of prohibiting the advocacy of *lawful* activity, yet it is always in danger of doing just this, if it prohibits the advocacy of activity whose legality is a subject of dispute. Moreover, even if the activity advocated should turn out to be unlawful, that in itself does not seem to be sufficient grounds for having prohibited its advocacy. As Mr. Justice Rutledge pointed out in *Musser v. Utah*,† what is presently unlawful may eventually become lawful (since new laws may be passed), but this is not likely to happen if no one is allowed to advocate that it happen. And one might add, what now seems unlawful may come to be seen as lawful, but it is not likely that that will happen if citizens are discouraged from advocating test cases. The fact that some of these cases will lose in the courts cannot be a reason for discouraging or prohibiting their advocacy in general. In the end, when one considers the words of the First Amendment, which, after all, are not vague (in my view anyway), and when one takes into account the fact that within our system there are no means of presenting certain sorts of challenges to the lawfulness of governmental activity without breaking a law, then it would seem that the Court should permit all forms of advocacy short of obvious attempts to incite to violence.

But even though the First Amendment may be held to protect nearly all forms of advocacy, I cannot see that it could be held to protect the substantive acts of civil disobedience or civil challenge themselves. That is, I do not think that one can reasonably argue that an individual should be immune from conviction solely on the grounds that he has broken the law for the sake of conscience or for the sake of creating a challenge to the law's validity. Harrop Freeman, for example, seems to take the position that the First Amendment protects civil disobedience and adduces as evidence the fact that the Court has in a series of rulings upheld the right to picket, the right to strike, the right to demonstrate, etc.** I think, though, that this argument is confused. It is not that the Court by these rulings has held acts of civil disobedience to be protected action; rather the Court has widened and clarified the scope of what is lawful to include acts which previously may have been considered by some to be civilly disobedient acts. It has said in effect that these actions were *not* cases of civil disobedience. (To use my terminology one might say that they were cases of civil challenge whose claims were vindicated by the Court.) Indeed, it is hard to imagine that the Court will ever rule that any and all

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* 325 U.S. 478, 493.

† 333 U.S. 95.

** His views appear in the booklet, "Civil Disobedience," cited above; see pp. 5-10.

action which is conscientiously motivated is lawful action. And as long as conscience and the law do not coincide there will inevitably remain the possibility of civil disobedience, that is, the possibility of unlawful, unsanctioned, but morally motivated actions. The tension between the state and the conscience of the individual or group cannot be so easily eliminated.

The same is true of civil challenge. Almost by its very definition civil challenge may fail. The law or command contested and infringed may be upheld. Can the Court then do anything but convict? Can it acquit a man on the ground that up till then the law was doubtful? If one answers in the affirmative, then one must have a criterion or criteria for identifying laws that may legitimately be held to be doubtful. Otherwise one may open the way for all kinds of unmerited and fraudulently obtained verdicts of innocence. Ronald Dworkin in an article in the *New York Review* earlier this year* has tried to provide such a criterion. He suggests that a law's status may be considered doubtful (for purposes of arriving at a verdict; in other contexts he thinks a law can be considered doubtful indefinitely) as long as the Supreme Court has not ruled that it is valid or that the political question doctrine applies. The first challenger or group of challengers should be acquitted, but if the Supreme Court does not uphold their contentions, any subsequent challengers should be convicted (unless, of course, the Court changes its mind about the law). Such a policy, however, hardly seems fair. Dworkin himself admits that it is often only as the result of a long and sustained series of challenges that the Court finally comes to see the objectionable and unconstitutional qualities of a statute or comes to the view that the political question doctrine does not apply after all. Why, then, should the first set of challengers be protected, while later challengers run the full risks of having transgressed the law? Does this seem to be a practice we would want to see established as a general rule?

IT SHOULD NOT be thought that I am against the government's taking measures for the benefit of the civil disobedient or the civil challenger. Quite the contrary. But easing the lot of the civil disobedient or the civil challenger should be accomplished in the most fair and rational way possible. When I say "fair" and "rational" here, I mean fair and rational within the context of some sort of legal framework, that is, a framework in which intuitions of justice have been replaced by explicit procedures and rules. Now it will not do as a general rule that men should be acquitted because of their motives, beliefs, or intentions—not only because motives, beliefs, and intentions may be difficult to ascertain, but also because any polity may wish to forbid certain behavior no matter how well-motivated or well-intentioned that behavior may be. In fact, that is part of what any legal system is all about. Certain kinds of acts are legitimized while others are placed beyond the pale of the system's approval. Consequently that point in the legal process where the decision for conviction or acquittal is made seems the least appropriate and the least defensible point to make accommodations for the benefit of the civil disobedient or the civil challenger. It is at this point that a legal system is least capable of flexibility.

There are, however, other points where accommodations might be made and there are important grounds for doing so. One of these grounds lies in the inherent fallibility and inevitable narrowness of any system and the consequent desirability of limiting the range of application of all systems. A second ground lies in the fact that a state may find it to its own advantage not to bear down too hard on dissident elements. Abstention from persecution is always desirable from a humanistic point of view and often desirable from the point of view of the state (ideally it ought always to be desirable from the point of view of the state too). Abstention from confrontation may or may not be desirable in a given case from these two points of view, but it must be recognized that *sometimes* benefits accrue to everyone if a confrontation is avoided. Finally, it is to the benefit of the law itself and to the benefit of the polity if there are established procedures whereby emergent notions of what is just and what is fair can be incorporated into the law. Such procedures should allow for and even encourage the contributions that can be made by dissident minority groups and individuals.

The grounds for somehow accommodating the civil disobedient or the civil challenger provide clues as to what sort of provisions might be desirable. The first and second grounds particularly provide reasons for not always prosecuting. Often it may seem either more humane or more convenient not to bring the force of the law to bear on certain individuals or groups who have transgressed the law. As Dworkin says in his *New York Review* article: "Society 'cannot endure' if it tolerates all disobedience; it does not follow, however, nor is there evidence, that it will collapse if it tolerates some." Not only will some tolerance not bring collapse; in certain situations some tolerance may be the only way to prevent collapse. Beyond that, tolerance may in some cases be demanded by an ethic of respect for human diversity, even though not all of the details of that ethic are or can be formally incorporated into the law.

The grounds for not prosecuting may also be grounds for leniency or at least moderation in

* "On Not Prosecuting Civil Disobedience," June 6, 1968, p. 14.

sentencing if prosecution does occur. It may often seem more humane or more convenient or, I might add, more just, to give a light sentence. Where civil challenge is involved, a light sentence may be given as a sign of the judiciary's recognition that such test cases are essential if the vitality of the law is to be maintained. (There will probably be a reluctance, however, to recognize a long series of similar cases as test cases. I see no remedy for this problem except the eventual one provided by the fact that the courts may, under the impact of these cases, revise their reading of the law and thus be able to acquit.) No doubt there are bound to be flaws in this exercise of judicial discretion; a judge's moral and political biases are highly likely to influence his decision in matters of sentencing, even when he has been reasonably impartial in arriving at a verdict. I would say, for example, though I know that there are many who would disagree with me, that a nonviolent opponent of integration who commits civil disobedience or civil challenge should be granted the same measure of leniency that we would feel is due a nonviolent opponent of segregation who commits such acts. Not only does this seem to me the most fair thing to do, it also seems to me the most practical thing to do. Strongly-held convictions are rarely eradicated by punishment; in fact the harsher the punishment, the greater may be the reinforcement of the conviction. In addition, although harsh sentences may deter other potential offenders, one must always wonder whether the bitterness which may be provoked among the dissident group is worth the price, not to speak of the moral doubtfulness of using individuals as "examples" for the rest of the community.

THIS BRINGS ME to my final point. Perhaps some cases of civil challenge —and indirectly some cases of civil disobedience— could be and could have been avoided if there existed more possibilities of bringing constitutional issues before the higher courts without having first to break a law. Nonprosecution, I think, is *not* much help to the committed civil challenger. This individual is not looking for tolerance. He is looking for a hearing—which is something rather different. What he wants is to get a case before the courts and eventually before the Supreme Court, so that he may prove to the judiciary the rightness of his contentions. Nonprosecution, therefore, may result in the complete frustration of his purposes (though his purposes may not be frustrated if his action and others like it lead the authorities to prosecute at least one case of the type which their actions present).

That is why Ronald Dworkin's question: "What means can be found for allowing the greatest possible tolerance of conscientious dissent while minimizing its impact on policy?" will not ring well in the ears of a civil challenger. It is not tolerance that he seeks. What he seeks is precisely to have an "impact on policy" and he seeks a confrontation in the courts as a means to having that impact. Even where the Supreme Court has so far refused to grant *certiorari* in a case such as his, still he seeks prosecution since he believes that one must try and try and try again.*

Consequently, the only way to help the civil challenger is through leniency or moderation in sentencing or, as I have just suggested, through making it unnecessary for him to break the law in the first place. Earlier in this article, when discussing the case of the Boston Five, I questioned whether it should be necessary for an individual to break a law as a means of getting the courts to consider whether that law, and perhaps other governmental action indirectly related to that law, is or is not illegal. Yet in the past this has often been necessary. Traditionally the Court has taken the position that it would only decide constitutional issues when they were forced on it, so to speak. This position has been expressed in the "case and controversy" requirement (derived from Article III of the Constitution) which has been interpreted to require that "a plaintiff must be injured in a 'right' before he can challenge governmental action."† As a result the courts have often held that the individual did not have "standing" to sue the government or to ask the courts for a declaratory judgment or an injunction or in general to obtain judicial review of alleged unconstitutional governmental action by means of a kind of action which did not involve breaking the law. On many occasions the courts have held that the alleged wrongful governmental action had inflicted no injury on the plaintiff or that the injury was too small or not of the kind to merit judicial attention. For example, taxpayers have till recently been held to have no standing to challenge federal laws making appropriations because the interest of the individual taxpayer is "comparatively minute and indeterminable."**

Yet a taxpayers suit might in a number of instances have made the sort of challenges I have been describing unnecessary. For example, as I mentioned earlier, the taxpayers suit of Mr. Velvel raises some of the same issues that are raised by the draft challengers. But because this and other lawful modes of challenging governmental action have often been unavailable, concerned citizens have been led to take more extreme measures in order to create standing for

* One of the complications in the current "aid and abet" movement has been that while some of its adherents were asking to be prosecuted, others would be quite happy not to be prosecuted. Even if the government were trying to be obliging in these matters, it might have difficulty figuring out who was who.

† Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis," *Yale Law Journal*, March 1966, p. 522, note 13.

** *Frothingham v. Mellon*, 262 U.S. 447, 487.

themselves. By publicly breaking a law connected with or constituting the alleged governmental wrong, they created a very real potential injury (imprisonment and/or fine) and thereby were able to obtain a hearing.

One problem with this procedure, however, is that sometimes not even breaking a law can create standing to raise an issue.* For example, what law could have been broken by those who wanted the Court to consider the reapportionment question? Furthermore, even where there is a law to be broken, the penalties for breaking some laws are so great that few, if any, individuals would be inclined publicly to break them, no matter how doubtful their status might seem.† Besides, as I tried to indicate by my earlier questions, even when the penalty is not great, it is hard to see why the individual or group that wishes to raise a serious constitutional issue should have to risk incurring any penalty at all. Does this risk really contribute to having the challenge presented in the clearest and most forceful manner possible? Cannot an individual consider his stake in a public issue to be very great even when the action or practices he questions do not harm him in an immediate and obvious way and even when he will not suffer any immediate, tangible loss should the courts hold against him? Does a criminal trial really provide the best possible arena for the resolution of problems of constitutional interpretation?**

WHAT I AM suggesting is that it might be preferable if the need for civil challenge, as I have defined it, could be largely eliminated. This could be achieved if the rules on standing were relaxed and it became more easily possible for citizens to sue the government. In fact, in a recent decision the Supreme Court may have taken a step in this direction. In *Flast v. Cohen*, the Court held that contrary to its previous ruling in *Frothingham v. Mellon* (from which I quoted above), taxpayers *do* have standing in certain cases to challenge federal appropriations. As a result, the Court may allow a variety of suits which have till now been held inadmissible. Just how wide a door the Court has opened, though, will only be revealed by the future. The Court still has discretion not to review on other grounds, a discretion which no doubt is to be desired, but at least "lack of standing" will be less of an automatic bar to otherwise acceptable cases.

In the meantime, challenges to the draft and to the war will continue. Some of the questions raised by the draft challengers and their supporters have been posed in the past in taxpayers suits and there are presently taxpayers actions before the courts or in preparation which attempt to do the same thing. Until and unless one of these cases reaches the Supreme Court and is acted upon favorably there, only hard choices will face the individual who is confronted with an order to report for induction and who firmly believes that American actions in Vietnam are in violation of the Constitution and of international law. Even a ruling by the Court that the war does not violate fundamental norms will not be much help to him. The opponents of slavery and of segregation could not be convinced by the Court's initial judgments in these areas and it is not likely that the opponents of the war will be convinced either. If the Court rules against their contentions, it is likely that they will continue to resist and will use the Court's decision to underline the need to establish more impartial and more cosmopolitan institutions to weigh such matters.

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* It is because it is sometimes necessary to practice indirect, rather than direct, civil challenge and because of the fact that sometimes even that mode of challenging the government is not available that I cannot accept Mr. Justice Fortas's conclusion in his recently published booklet, "Concerning Dissent and Civil Disobedience," in which he states that the only laws which can justifiably be violated are those which are themselves "basically offensive to fundamental values of life or the Constitution" (p. 63). It seems to me that disruptive civil disobedience may be justifiable when the government itself is committing great legal wrongs and there is not a fundamentally offensive law which can be broken as a means of bringing the issue into the courts. In such cases either one must break a law which may not be extremely objectionable in itself, but is related to the wrong that is being protested or, if no such law exists, and perhaps even if it does, then disruptive civil disobedience may be justifiable as a means of awakening the conscience of the nation to the wrongs perpetrated by its government.

† Those who are in a position or who are inclined to take the risk of a serious penalty are not necessarily those best equipped to present a cogent, well-argued case before the courts. If the functional requirements for a correct constitutional decision are, as Scharpf suggests (*op. cit.*, p. 521), "a well developed case, litigated by the best possible parties," then the traditional rules of standing may operate to hinder the Court in its tasks.

** The purpose of the traditional rules of standing has been to assure that the parties to a dispute were truly adverse and that the question raised was not merely hypothetical. I wish to suggest that where the constitutionality of important governmental action is concerned, direct personal injury may not be the only or best guarantee of adverseness. In fact, the individual directly injured by alleged unconstitutional action may be happy to win on any sort of technicality, in other words, to win for himself, but not for others who have been similarly affected. Or he may be adverse to the government for reasons that are rather inconsequential. The party who is less directly injured may be more truly adverse on constitutional grounds. Furthermore, it does not require direct, immediate, or obvious injury for a question to be removed from the realm of the hypothetical.